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Supreme Court, U.S.
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No. 00-1837

In the
Supreme Court of the United States

JAMES NELSON, et al.,
Petitioners,

v.

TENNESSEE GAS PIPELINE COMPANY;
EL PASO TENNESSEE PIPELINE COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

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ARGUMENT

I.

FIRST COMPELLING REASON TO GRANT CERTIOARI:

THERE EXISTS A SPLIT IN THE CIRCUITS, I.E., CONFLICTING COURT DECISIONS, REGARDING THE ADMISSION OF EXPERT TESTIMONY EVER SINCE *DAUBERT*.

Prior to *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), this Court had not construed *Fed. R. Evid.* 702, or the question of expert testimony admission, in the prior century. But including *Daubert*, there have been four Supreme Court decisions and over 1,350 federal court decisions grappling with the issue of the admissibility of expert testimony. It is a burgeoning area of law, where conflicting court decisions often generate more confusion than light on the issue. By excluding expert testimony, the vast majority of these cases deprive injured persons from having their day in court. Rule 702 jurisprudence has taken an area of the law that was relatively stable, and shaken it to its footings.

All too often, the result depends not upon the quality of the expert witness or the soundness of his/her scientific or technical theory, but on the individual judge's predilection to usurp the jury's role of weighing credibility and factual matters pertaining to the expert testimony. Often ignored is Justice Blackmun's cautionary statement in *Daubert* that "[t]he focus, of course, must be solely on principles and methodology, not on the conclusions that they generate,".

Daubert, 509 U.S. at 594-95, 113 S.Ct. at 2797. Likewise, Justice Stephen Bryer's *caveat* that "judges are not scientists and do not have the scientific training that can facilitate the making of such decisions," seems to have fallen on deaf ears. *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 520 (Breyer, J., concurring). The district courts, in particular, have found themselves fully competent to become fledgling scientists and to pass on scientific and technical issues that the best minds in the relevant fields have debated for years.

In *Ambrosini v. Labarraque*, 101 F.3d 129 (D.C.Cir.1996), plaintiffs brought an action claiming that the pre-natal administration of Depo-Provera and Bendectin resulted in birth defects. The district court dismissed the case, confusing the question of admissibility with the persuasive weight to be assigned to the expert evidence. The plaintiff's expert submitted an affidavit alleging causation, based solely upon his experience and expertise as an ob-gyn. The Circuit Court of Appeals reversed. It held the district court improperly determined, under the "gate-keeping" rubric, that plaintiff's expert would not prevail at trial, which was an improper analysis.

In the present case, even though Plaintiffs' experts presented evidence in accord with accepted scientific methodology for the field of PCB exposure, the Sixth Circuit affirmed the district court's decision. Plaintiffs experts have spent their entire lives in the field of toxicology and have been published hundreds of times. Respondents stated that Plaintiffs have only represented a portion of the record in their petition. Number one, the record is extremely voluminous and only a portion can be covered in a thirty-page petition. Number two, it is Plaintiffs' experts who have supplied the record with the voluminous PCB related

published scientific studies and articles. Respondents only relied upon the opinions of their own privately retained experts. Respondents did not place any scientific studies or publications into the record. Therefore, it is Plaintiffs place to represent to the Court what the scientific literature and studies say about PCB exposure protocals and methodologies. It is Plaintiffs experts who are familiar with these published studies and methodologies in the field of PCB and related chemical exposures. It is Plaintiffs experts who have devoted their life's work to this field. As Justice Scalia wrote in his concurring opinion in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999), *Daubert* and its progeny were intended to exclude "expertise that is *fausse* and science that is junky." Plaintiffs experts do not fall into these categories.

The trial court need only determine if the expert's opinion properly falls within the scope of Rule 702 and will help the jury. The balance, under *Ambrosini*, is the jury's function, not the trial court's.

In weighing the admissibility of proposed expert testimony, the courts should keep in mind the Rule 702 inquiry under *Daubert* is flexible. Justice Blackmun's proposed points of inquiry in *Daubert* are merely examples; the Supreme Court did not intend to limit the tools a trial court may use to test the reliability of proposed expert testimony. As the Supreme Court wrote in *General Electric*:

> [t]he inquiry envisioned by Rule 702 is . . . a flexible one. Its overarching subject is the scientific validity - and thus the evidentiary relevance and reliability — of the principles that underlie a proposed submission. [footnote omitted]. [T]he Federal Rules of Evidence

> allow district courts to admit a somewhat broader range of scientific testimony than would have been admissible under *Frye*. . . ."

General Electric, 118 S.Ct. at 517.

This Court in *Kumho Tire*, pursued this line of analysis even further and has, plaintiffs believe, altered the trial court's fundamental role:

> [T]here are many different kinds of experts and many different kinds of expertise. [Citation omitted]. . . . We agree with the Solicitor General that "[t]he factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." Brief for United States as Amicus Curiae 19. *The conclusion, in our view, is that we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in Daubert, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue. Daubert itself is not to the contrary. It made clear that its list of factors was meant to be helpful, not definitive. Indeed, those factors do not all necessarily apply even in every instance in which the reliability of scientific testimony is challenged*.

Kumho Tire, 119 S.Ct. at 1177 [emphasis added}. *See also Metabolife International, Inc. v. Wornick*, 1999 WL 1179876

(S.D. Cal., Nov. 17, 1999), slip op. at 5 (*Daubert* did away with the "general acceptance" test because it was at odds with the "liberal thrust" of the Federal Rules).

Nonetheless, Justice Blackmun's "suggestions" have taken on lives of their own, being transformed into rigid tests some courts mechanically apply to admit or more often to reject Rule 702 testimony. *Lauria v. National Railroad Passenger Corp.*, 145 F.3d 593, 598-99, citing *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717, 741 (3rd Cir. 1994) ("*Paoli II*"). In the process, many lower courts appear to have construed *Daubert* and its progeny as a mandate to keep out expert testimony whenever possible, particularly where the scientific or technical evidence is evolving to establish the causal connection. *Moore v. Ashland Chemical Co.*, 151 F.3d 269 (5th Cir. 1998).

Yet these cases were decided in spite of Justice Blackmun's sensible case-by-case analysis in *Daubert*, and before Justice Breyer's sensible explanation in *Kumho Tire* that judicial "gatekeeping" cannot invade the jury's province, since the jury ultimately must "decide among conflicting views of different experts, even though the evidence is 'shaky.'" *Kumho Tire*, 119 S.Ct. at 1177.

In the present case, the district court required rigid adherence to the *Daubert* criteria, even though all these criteria may have had little or no relevance to this case. For example, the research plaintiffs' experts performed was in line with scientific methodology and protocals for this particular field. However, despite the fact that the scientific literature and studies done on PCB and related chemical exposures show that a dose-response relationship is non-existent in humans, the lower courts still mandated such.

Additionally, because the study done in the present case was not published until after the record was compiled for the Sixth Circuit Court of Appeals, the court stated that the study was not peer reviewed and generally accepted within the scientific community. Of course, the study has since been published. Since the study was just recently published, it hadn't yet been considered at scientific conferences, critiqued in peer-edited journals, all for the benefit of the Sixth Circuit. However, this Court should be able to take judicial notice of published articles. Moreover, this Court in *Daubert* stated that general acceptance is not a precondition to the admissibility of scientific evidence. 509 U.S. at 597.

Respondents also noted that the cases cited in Petitioners' Writ, wherein Plaintiffs' expert was allowed to testify, was also not part of the record below. But likewise, this Court is able to take judicial notice of relevant case law.

In summary, the federal court decisions are not consistent amongst themselves or with the Supreme Court decisions on this issue. Moreover, in the present case, the district court and Sixth Circuit held Plaintiffs' experts to a rigid, inflexible standard, applying criteria not applicable to PCB exposure studies, criteria not consistent with the relevant scientific studies.

II.

SECOND COMPELLING REASON TO GRANT CERTIORARI:

THERE EXISTS A SPLIT IN THE CIRCUITS REGARDING THE ISSUE OF AN EVIDENTIARY *IN LIMINE* HEARING BEFORE DECIDING THE ADMISSIBILITY OF EXPERT TESTIMONY PURSUANT TO *DAUBERT*.

The preferred procedure for admitting or excluding scientific expert opinion under Rule 702, one not followed in this case, is an evidentiary hearing on the motion *in limine*. In *In re TMI Litigation*, 2000 WL 19850 (3rd Cir., Jan. 4. 2000), the Third Circuit explained:

> In [*Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412 (3rd Cir. 1999)], the defendant moved for summary judgment, arguing that the plaintiff's expert's report did not meet *Daubert* standards for admissibility. The District Court excluded the expert's report and granted summary judgment to the defendant without an *in limine* hearing. We reversed and remanded for an *in limine* hearing.
>
> We were concerned with the process the District Court must generally use in exercising its gate-keeping role under *Daubert*. We noted that "[w]e have long stressed the importance of *in limine* hearings under Rule 104(a) in making the reliability determination required under Rule 702 and *Daubert*" [citations

> omitted], especially when a *Daubert* challenge is made in the context of a summary judgment motion or where summary judgment will inevitably be granted if the proffered evidence is excluded. *Thus, we expressed our belief that an in limine hearing is important, even in the absence of a request for such a hearing by the proponent of the expert testimony, because of the District Court's "independent responsibility for the proper management of complex litigation," and because the plaintiff "need[s] an opportunity to be heard" on the critical issues of scientific reliability and validity*. [citation omitted.] When afforded such an "opportunity to be heard," a plaintiff has a chance to have his or her expert demonstrate and explain the "good grounds" upon which the expert evidence rests. [citation omitted.] *Moreover, an opportunity to demonstrate the expert's "good grounds" is particularly important when the court's ruling on admissibility turns, in large part, upon "the factual dimensions of the expert evidence."* [Citation omitted.] . . . *[W]e held that "when the ruling on admissibility turns on factual issues, . . . , at least in the summary judgment context, failure to hold [an in limine] hearing may be an abuse of discretion."* [*Padillas v. Stork Gamco*, 186 F.3d at 418].

TMI Litigation, slip op. at 1. [emphasis added].

When the trial court makes a decision absent the evidentiary *in limine* hearing, it in effect rules in a vacuum, substituting its own ideas of the expert's testimony for that

which the expert will actually testify to in the heat of litigation. The trial court judge may also concoct difficulties with the expert's methodology which, given the chance, could be clarified by the expert himself, who is, after all, the scientific expert, not counsel or the judge. In *General Electric*, 118 S.Ct. at 520, Justice Breyer, in his concurring opinion stated:

> [The *Daubert*] requirement will sometimes ask judges to make subtle and sophisticated determinations about scientific methodology and its relation to the conclusions an expert witness seeks to offer - particularly when a case arises in an area where the science itself is tentative or uncertain, or where testimony about general risk levels in human beings or animals is offered to prove individual causation. Yet, as *amici* have pointed out, judges are not scientists and do not have the scientific training that can facilitate the making of such decisions.
>
> . . .
>
> [W]hen law and science intersect, those duties often must be exercised with special care.

In the present case, the district court did not hold an *in limine Daubert* hearing. Additionally, the court did not allow Plaintiffs an opportunity to remedy the court's perceived deficiency in the experts' methodology. An increasing number of courts are allowing proponents of expert testimony the opportunity to remedy proposed deficiencies in the Rule 702 testimony, rather than dismissing the case outright. *See Summers v. Missouri Pacific R.R. System*, 132 F.3d 599 (10th Cir.1997).

Since the Supreme Court's supposedly "uniform" standards vary from court to court, it is rare for a plaintiff going into litigation to know how the district court will construe Rule 702 and the *Daubert* progeny. When the district court finds a particular submission insufficient, considerations of equity and fair play demand that the court allow the plaintiff a reasonable opportunity to provide information that will satisfy the court's understanding of what Rule 702 requires.

CONCLUSION

For the compelling reasons mentioned in the Petition and in this reply brief, the Petition for Writ of Certiorari should be granted.

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